

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT A. HOWES	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner, Robert A. Howes, 30 Rockefeller Plaza, Room 2405, New York, New York 10112, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File No. 803778).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 30, 1987 at 1:15 P.M., with all briefs to be submitted by July 24, 1987. Petitioners appeared by Chadbourne and Parke, Esqs. (William G. Cavanagh and Ewing W. Madole, Esqs., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner is entitled to an allocation of the consideration received on the transfer of certain mixed use (residential and business use) real property, whereby said transfer would be exempt from the imposition of gains tax (Tax Law Article 31-B) as falling below the million dollar gains tax threshold.

STIPULATED FACTS

On April 30, 1987 the duly authorized representatives for petitioner (William G. Cavanagh, Esq.) and for the Audit Division (Paul A. Lefebvre, Esq.) executed a stipulation of facts pertaining to the instant matter. Such stipulated facts, numbered "1" through "20", follow:

1. On April 29, 1977, Counsel Properties, Inc. ("CPI"), a New York corporation, purchased a four-story building (along with the underlying land and assorted personalty) located

at 47 West 9th Street, New York, New York (hereinafter "subject property") which consisted of five apartments.

2. After such purchase, the apartments in the basement and on the second through fourth floors (hereinafter "business use property") were leased to third parties by the owner; the ground floor apartment (hereinafter "personal residence") was used exclusively by petitioner, Mr. Howes, as his personal residence.

3. Immediately after acquiring the subject property, CPI was liquidated and the subject property was distributed to the sole shareholder, Mr. Howes.

4. The reason Mr. Howes purchased the subject property through CPI was to facilitate bank financing.

5. Immediately after CPI was liquidated the business use property was contributed to Counsel Properties Company ("CPC"), a New York general partnership of which Mr. Howes is a general partner.

6. Thereafter, the business use property was owned by CPC and the personal residence was owned by Mr. Howes individually.

7. For convenience, the partnership agreement authorizes Mr. Howes to hold title to the business use property in his own name notwithstanding the partnership's ownership of such property.

8. On March 19, 1985, Mr. Howes executed a contract of sale for the subject property, for a total consideration of \$1,400,000, of which \$1,396,000 was allocable to the real property and \$4,000 was allocable to the personal property.

9. The sale was consummated on July 3, 1985 by transfer of a single deed for the entire subject property. Since title to both the business use property and the personal residence was held in the name of Mr. Howes, as permitted by the partnership agreement, Mr. Howes executed the deed.

10. On April 29, 1985, Mr. Howes filed a New York State Real Property Transfer Gains Tax ("Gains Tax") Questionnaire-Transferor (Form TP-580) in connection with the above sale in which he allocated the total consideration allocable to the real property of \$1,396,000 as follows: 35% (\$488,600) to the personal residence and 65% (\$907,400) to the business use property.

11. During an audit in 1978 through 1979 the Internal Revenue Service had prescribed such an allocation for Mr. Howes' 1977 Federal income tax return.

12. The anticipated tax due of \$65,151.50, as shown on Schedule B of Form TP-580, was computed only with respect to the business use property.

13. The allocation of purchase price between the business use property and the personal residence was consistent with the allocation used by CPC on its respective Federal and State income tax returns for purposes of depreciating the business use property, reporting annual income or loss on the business use property, and reporting the gain from the instant transfer.

14. On June 20, 1985, the New York State Department of Taxation and Finance issued a Tentative Assessment and Return (Form TP-582) with respect to this sale showing a total tax due of \$65,151.50.

15. The entire amount of tax of \$65,151.50 was paid on July 3, 1985.

16. On August 29, 1985, Mr. Howes filed a Claim for Refund of Real Property Transfer Gains Tax (Form TP-165.8) requesting that the entire tax paid be refunded.

17. On March 31, 1986, the Audit Division issued a letter denying the Claim for Refund in total.

18. A Petition for Refund was filed on behalf of Mr. Howes on June 27, 1986.

19. The Audit Division filed its Answer to Mr. Howes' Petition on February 18, 1987.

20. On March 23, 1987, Notice of Hearing was mailed indicating that a hearing had been scheduled for April 30, 1987.

ADDITIONAL FINDINGS OF FACT

21. The contract of sale for the subject property included a rider which provided, at

paragraph 42(f), as follows:

"42. Seller [Robert A. Howes], to induce Purchaser to enter into this Agreement and to purchase the premises, represents and warrants to Purchaser as follows:

* * *

Seller [Robert A. Howes] is the sole owner of the property and has all legal right to convey the same to Purchaser."

22. CPC consisted of Mr. Howes and one Suzette Hennion, as partners. The initial capital contributions to the partnership were \$220,000 by Mr. Howes and \$5,000 by Ms. Hennion, with any partnership profits to be split equally and any net partnership losses allocated 99 percent to Mr. Howes and 1 percent to Ms. Hennion.

CONCLUSIONS OF LAW

A. That section 1441 of the Tax Law, which became effective March 28, 1983, imposes a tax at the rate of ten percent on gains derived from the transfer of real property within New York State. However, Tax Law § 1443(1) provides that no tax shall be imposed if the consideration is less than one million dollars.

B. That Tax Law § 1443(2) provides a limited exemption from the gains tax, as follows:

"[i]f the real property consists of premises occupied by the transferor as his residence (but only with respect to that portion of the premises actually occupied and used for such purposes)." (Emphasis supplied.)

C. That 20 NYCRR 590.25 provides, in part, as follows:

"Residence used for business purpose. [Tax Law, § 1443(1), (2)]

(a) Question: How does the million-dollar exemption interact with the residential exemption when the transferor used a portion of his residence for a business use?

Answer: The million-dollar exemption is applied to the total consideration received for the transfer of the real property and therefore, if the total consideration is \$1 million or more the transaction will be taxable to the extent of gain realized on the business portion of the real property. The consideration received and the original purchase price must then be allocated between the portion of the property used for business and the residential portion; generally this allocation will be based on the method of allocation used on the transferor's Federal and State income tax return."

D. That title to a single piece of property, used in part for business (rental income) and in part as a residence, was transferred by petitioner. Petitioner properly reported the transfer, made an allocation of the consideration received and of the original purchase price for the property in order to determine the extent of the gain on the business part of the property, and paid the gains tax calculated as due thereon. Petitioner now argues that, in effect, two transfers occurred, (one by the partnership and one by petitioner) each of which involved consideration in an amount less than the gains tax million dollar threshold. However, the facts in this case simply do not support such assertion¹. Accordingly, petitioner's claim for refund, based upon such assertion, is rejected.

E. That the petition of Robert A. Howes is hereby denied and the Audit Division's denial of petitioner's claim for refund is sustained.

DATED: Albany, New York
November 13, 1987

ADMINISTRATIVE LAW JUDGE

¹Even if two transfers were to have occurred it appears that, under these facts, the transfers could be aggregated in determining the applicability of the section 1443(1) exemption.